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Supreme Court of the United States

OCTOBER TERM—1957.

No. 921

IRVING KLAW,

Petitioner,

—against—

ROBERT H. SCHAFFER, individually and as Postmaster of the United States Post Office at New York, N. Y.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM—1957.

No. .....

IRVING KLAW,

Petitioner,

—against—

ROBERT H. SCHAFFER, individually and as Postmaster of the United States Post Office at New York, N. Y.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Irving Klaw[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on January 31, 1958.

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[1] Irving Klaw is the petitioner for the writ of certiorari. In the administrative hearing he was the "respondent"; in the District Court, the "plaintiff" and in the Court of Appeals, the "appellant". For convenience Irving Klaw will hereafter be referred to as "petitioner".

Opinions Below

The opinion of the Court of Appeals, Second Circuit, appears in the Appendix to Appellant's Brief in the Court below (63a)[2] and is reported in 251 F. 2d 615. The opinion of the United States District Court for the Southern District of New York, Edelstein, *J.*, appears in said Appendix (49a-62a) and is reported in 151 F. Supp. 534. The opinion of the Solicitor for the Post Office Department appears in said Appendix (25a-30a) and the Initial Decision of the Hearing Examiner, Post Office Department, appears in said Appendix (1a-24a).

Jurisdiction

The judgment of the Court of Appeals, Second Circuit, was entered on January 31, 1958 (63a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Does 39 U. S. C. § 259a empower the Postmaster General to issue an order suppressing the receipt of *all* mail for the indefinite future regardless of whether mail is or is not held unlawful after administrative hearing?

2. If 39 U. S. C. § 259a empowers the Postmaster General by administrative order to prohibit receipt of *all* mail for the indefinite future, does the statute impose a prior restraint upon innocent mail in violation of the First Amendment, U. S. Constitution?

3. If 39 U. S. C. §259a empowers the Postmaster General by administrative order to prohibit receipt of *all* mail for the

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[2] Numbers in parentheses, followed by the letter "a" refer to the page in the Appendix to Brief of Appellant in the Court below; numbers in parentheses preceded by "Tr" refer to the page in the Official Transcript of testimony before the Hearing Examiner of the Post Office Department.

indefinite future, does the statute inflict cruel and unusual punishment in violation of the Eighth Amendment, U. S. Constitution?

4. Is due process of law under the Fifth Amendment, U. S. Constitution, violated in an administrative hearing when hearsay evidence of no probative value but highly prejudicial and inflammatory is admitted against petitioner, when cross-examination of adverse witnesses by petitioner is unduly restricted, and when competent and material evidence offered by petitioner is illegally excluded?

Constitutional Provisions and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in Appendix A, *infra*.

Statement

In May, 1955, the Post Office Department issued a complaint alleging that there was probable cause to believe that petitioner, in violation of 39 U. S. C. § 259a was obtaining and attempting to obtain remittances of money through the mails for certain allegedly obscene photographs, slides, movies and drawings (32a-33a). The complaint prayed for the issuance of an order directing the Postmaster at New York City not to deliver mail addressed to petitioner, not to pay money orders drawn to him and to return such mail and money orders to the senders.

Petitioner appeared by attorney and filed an answer which denied the allegations of the Department's complaint and alleged as affirmative defenses that 39 U. S. C. § 259a is unconstitutional and also that the prayed for order would unlawfully discriminate against him because substantially similar material was being circulated through the mails by others under second-class mailing privileges accorded by the Post Office Department (33a).

A three-day administrative hearing was held in August 1955, in Washington, D.C. before a Hearing Examiner. In addition to the postal inspector who had investigated the case for the past five or six years (Tr. 279-280), four expert witnesses testified—a psychiatrist and three psychologists, two for the Post Office Department and two for petitioner.

Several months later, on December 16, 1955, the Hearing Examiner filed an initial decision in which he found that the material offended the statute (39 U. S. C. § 259a). However, he exonerated 68 photographs from any charge of obscenity (13a).

In accordance with the Post Office Department's Rules of Practice, petitioner appealed to the Solicitor of the Post Office Department, who without any citation of judicial authority, affirmed the Hearing Examiner's Initial Decision in an opinion filed on July 9, 1956 (25a-29a). On that date, Postmaster-General's Order No. 56158 was issued to the Postmaster at New York City directing that *all* mail addressed to Irving Klaw be marked "Unlawful: Mail to this address returned by order of the Postmaster General" and returned to the senders. The order also forbade the New York City Postmaster to pay any postal money order drawn in favor of Irving Klaw and directed him to inform the remitter of such postal money order that payment thereof has been forbidden (29a).

On July 19, 1956, petitioner filed a complaint in the United States District Court, Southern District of New York, to enjoin the defendant Postmaster from enforcing the order of the Postmaster General on the ground that the order exceeds the scope of authority granted to the Postmaster by 39 U. S. C. § 259a, for a declaratory judgment that 39 U. S. C. § 259a, as interpreted and applied, is repugnant to the First, Fifth and Eighth Amendments, and for judicial review under the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq* of the decision and determination of the Hearing Examiner and approval of that decision by the Solicitor for the Post Office Department (31a-32a).

Petitioner's verified complaint and his affidavit in support of a motion for a preliminary injunction alleged that "the pictures against which the Post Office Department has complained represent about 35 to 40% of my business" (39a) and further stated, on information and belief, "that a substantial quantity of the mail which defendant has refused and still refuses to deliver are in no way related to" the Post Office complaint (34a). These allegations were not denied by the defendant.

On July 20, 1956, with the consent of defendant's counsel, District Judge Dimock signed an order to show cause why a preliminary injunction should not be granted and also signed a temporary restraining order requiring the Postmaster to impound all mail addressed to petitioner. The motion for a preliminary injunction was subsequently adjourned on consent of both sides and it was agreed to extend the restraining order until the case is decided upon the merits. This arrangement was embodied in a consent order signed by District Judge Levet on July 25, 1956. Defendant then moved for summary judgment and petitioner cross-moved for summary judgment (49a-50a).

The motions were argued on September 25, 1956, before Judge David N. Edelstein, District Judge. Eight months later, on May 7, 1957, Judge Edelstein filed his opinion granting defendant's motion for judgment which was entered the same day (62a). Judge Edelstein's opinion is reported in 151 F. Supp. 534.

Petitioner then appealed to the U. S. Court of Appeals Second Circuit, and urged reversal of the judgment on the ground that the administrative order exceeds the scope of authority granted to the Postmaster under 39 U. S. C. § 259a; that if the statute grants authority to the Postmaster to suppress *all* mail, it imposes a prior restraint on innocent mail in violation of the First Amendment and inflicts cruel and unusual punishment in violation of the Eighth Amendment. It was also urged that administrative due process was denied in violation of the Fifth Amendment by the Hear-

ing Examiner's evident partiality in rulings on the admission and exclusion of evidence.

The Court of Appeals affirmed the judgment in a per curiam opinion stating: "Affirmed on the opinion below, 151 F. Supp. 534; *Roth* v. *United States*, 354 U. S. 476; *Public Clearing House* v. *Coyne*, 194 U. S. 497" (63a).

REASONS FOR GRANTING THE WRIT

I

Question 1: Scope of Postmaster General's Authority under 39 U. S. C. § 259a

Admittedly, 60 to 65% of petitioner's business is not in any way related to the subject of the Post Office Department's complaint (37a-39a). Even 68 challenged photographs were exonerated by the Hearing Examiner (13a). Nevertheless, the Postmaster General's order prohibits delivery of *all* mail, whether innocent or guilty (29a).

On a similar state of facts, the Court of Appeals of the D. C. Circuit held in three different cases that the Postmaster's power to suppress mail is limited to mail directly related to material proscribed by 39 U. S. C. § 259a and "that future lawful activities of a defendant cannot be hampered in cases where he is engaged both in lawful and in unlawful activities."[3] These holdings firmly rested on this Court's decision in *Donaldson* v. *Read Magazine*, 333 U. S. 178 and on a thorough review of the legislative history of 39 U. S. C. § 259a. In the opinion of the D. C. Circuit, were 39 U. S. C. § 259a construed to authorize the Postmaster to stop *all* mail, "grave constitutional questions would then be presented."[4]

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[3] *Summerfield* v. *Sunshine Book Co.* (D. C. Cir.) 221 F. 2d 42, cert. denied 349 U. S. 921; *Tourlanes Publishing Co.* v. *Summerfield* (D. C. Cir.) 231 F. 2d 773, cert. denied 352 U. S. 912; *Oakley* v. *Summerfield* (D. C. Cir.) 231 F. 2d 775.

[4] *Summerfield* v. *Sunshine Book Co.*, *supra*, at page 48.

To justify the total suppression of *all* mail and the consequent paralysis of future lawful activities by petitioner, the District Court in the case at bar stated that it is "not too much to assume that *prima facie* all letters are identified with the prohibited enterprise", citing *Public Clearing House* v. *Coyne*, 194 U. S. 497 (53a). The Court of Appeals also cited the *Coyne* case in affirming the judgment (64a).

Thus there is a square conflict of opinion between the Second Circuit and the D. C. Circuit as to the scope of the Postmaster General's authority to suppress mail under 39 U. S. C. § 259a. The question has never been settled by this Court. Under these circumstances, this Court's power of supervision should be exercised.

Both the *Coyne* case and the *Read Magazine* case involved the fraud statute 39 U. S. C. § 259. These cases can be distinguished on their facts. When so distinguished, the irresistible conclusion is that the *Read Magazine* case governs in the case at bar and not the *Coyne* case.

In the *Coyne* case, an operation was organized and conducted to obtain subscriptions of money for an unproductive revolving fund from which to pay "maturities" of other subscribers. Condemning the enterprise as a fraudulent scheme, the Postmaster General issued a blanket stop-order against all mail. On appeal, this Court sustained the order on the theory that an indivisible entity carrying out a fraudulent scheme was involved, and, therefore, it could be assumed that *prima facie* all mail was "identified with such business".[5]

But in the case at bar, any such *prima facie* assumption is at war with the uncontradicted facts. Instead of an indivisible enterprise, an individual is engaged in the business of selling a variety of articles of which 60 to 65% are wholly foreign to the Post Office Department's complaint (36a-39a). To assume that *all* mail is connected with the subject of the complaint is palpably wrong and, therefore, arbitrary.

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[5] *Public Clearing House* v. *Coyne*, *supra*, at page 510.

Whether the statute authorizes and the constitution permits the quarantine of legitimate business by a blanket stop-order was carefully considered in the *Read Magazine* case. In that case, the Postmaster General issued a fraud order to prevent receipt of all mail addressed, and the payment of all money orders payable to the defendant's magazines and their personnel because the advertising for a puzzle contest was deemed false and fraudulent. The Postmaster General's order was not limited to the particular fraudulent contest. On this point, this Court said:

> "The order, if indefinitely enforced, might have resulted in barring delivery of mail and payment of money orders in relation to other non-fraudulent contests as well as legitimate magazine business. All of the foregoing raised questions about the validity and scope of the original order, if unmodified, which we deemed of sufficient importance to justify further argument For that reason we set the case down for reargument, requesting parties to discuss the validity and scope of the order, and whether, if invalid by reason of its scope, it could be so modified as to free it *from statutory or constitutional objections.*" (Emphasis added.)[6]

Before reargument, however, the Postmaster General revoked his order insofar as it applied to the lawful activities of the defendant and limited his order to contest mail. In light of the voluntary revision of the order, this Court found that the fraud order, *as modified by the Postmaster*, "removed the ban against delivery of mail and payment of money orders to their magazine, its editor and its agents * * *."

Since the modified order was restricted to the parties connected with the fraudulent contest, this Court sustained the order noting that "its future effect is merely to enjoin the continuation of conduct found fraudulent."

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[6] 333 U. S. at page 182.

The D. C. Circuit in *Summerfield v. Sunshine Book Co., supra*, interpreted this compelling language in the *Read Magazine* case to mean that fraud orders under Section 259 must be limited to activities found unlawful and that future lawful activities cannot be hampered. It concluded that: "this limitation upon the Postmaster General's powers would seem to apply equally to action under Section 259a."[7]

The D. C. Circuit also relied on the legislative history of 39 U. S. § 259a which conveys no suggestion of a Congressional intention to grant to the Postmaster General powers broader in scope than those he possessed under 39 U. S. C. § 259 as defined in the *Read Magazine* case.[8] A single letter from the then Postmaster General to the President of the Senate comprises the legislative history.[9] This letter states that the reason for the bill is the need to plug a loophole in existing law (39 U. S. C. § 255) which authorized the Postmaster to return to senders mail addressed to firms or individuals engaged in selling obscene matter under fictitious names. Authority, however, did not exist where the persons were using their true individual or corporate names. The requested bill was enacted with no Congressional debates and no floor discussions whatever.

Certainly the Postmaster General did not seek any wider powers than those he possessed under the fraud statute. Nor is there the slightest indication that Congress intended to grant him wider powers in 1950 than those granted to him under the fraud statute as construed by this Court in the *Read Magazine* case in 1947. For the two statutes are worded, in relevant portions, almost identically.

Petitioner respectfully submits that the *Read Magazine* case is the governing authority. The Postmaster's order can

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[7] 221 F. 2d at page 47.

[8] 39 U. S. §259a was enacted in 1950. *Donaldson* v. *Read Magazine* was decided in 1947.

[9] U. S. Code Cong. & Ad. News 3007 (1950).

validly extend only to mail relating to material against which a factual determination under 39 U. S. C. § 259a has been made. By suppressing *all* mail for the indefinite future, the order is too broad and is not authorized by the statute.

II

Question 2: As interpreted and applied, 39 U. S. C. § 259a imposes a prior restraint on innocent mail.

If 39 U. S. C. § 259a is interpreted, in accordance with *Donaldson* v. *Read Magazine, supra*, that only communications relating to proscribed material may be forbidden, then the order preventing receipt of *all* mail is too broad and is not authorized by the statute. If, however, 39 U. S. C. § 259a is interpreted as authorizing the suppression of *all* mail, then the statute imposes an unconstitutional prior restraint on innocent mail in violation of the First Amendment. In either event, the judgment should have been reversed and the New York Postmaster should have been enjoined from enforcing the order.

Utilization of mail facilities has always been deemed an essential part of freedom of speech and press guaranteed by the First Amendment. As stated by Holmes, *J.* in his dissenting opinion in *United States ex rel. Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, 437:

> "The United States may give up the Post Office when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues * * *."[10]

The issue here is not whether obscenity is within the area of constitutionally protected speech or press. That question

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[10] See also: Stanard & Olesen, 347 U. S. 590; and the dissents of Mr. Justice Holmes & Mr. Justice Brandeis in *Leach* v. *Carlile*, 258 U. S. 138, 140.

has recently been set at rest by this Court.[11] A much narrower constitutional issue is presented, namely, whether mail against which no factual determination has been adversely made, can be barred because of lesser dealings in material proscribed by the statute. To put the narrow issue another way, may prior restraints on innocent mail be imposed in order to catch in the dragnet mail that might possibly relate to proscribed material?

This issue was presented in *Donaldson* v. *Read Magazine*, *supra*, before the Postmaster General voluntarily modified his order to limit it to contest mail. Before then, the Court directed reargument "to discuss the validity and scope of the order, and whether, if invalid by reason of its scope, it could be so modified as to free it from statutory or *constitutional* objection."[12] While a square decision on the constitutional issue was not made, the strong implication is that grave constitutional questions are presented under the First Amendment if the Postmaster General's order prevents future lawful activities.[13]

In modern society, it is virtually impossible to live and to do business in a normal fashion without mail service. Mail is probably the most important avenue of communication for personal, commercial, and social intercourse. Without the mails, one is practically incommunicado. Though other means of communication might be available, such as telephone and telegraph, these modes of oral and written communication are at best but of limited scope. Purchase orders, shipping notices, invoices, month-end statements, tax notices, insurance premium notices—just to mention a few—do not and cannot utilize any method of delivery except mail service.

Not only is receipt of commercial and governmental mail prevented by the Postmaster General's blanket stop-order,

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[11] *Roth* v. *United States*, 354 U. S. 476.

[12] 333 U. S. at page 182 (Emphasis added).

[13] *Summerfield* v. *Sunshine Book Co.*, *supra*, at page 48.

but also intercepted are letters from friends and relatives, from religious, fraternal and social organizations. Sucked into the dragnet of the Postmaster General's stop-order is all this innocent mail. Instead of freedom of speech guaranteed by the First Amendment, petitioner is faced with a wall of total prior restraint for the indefinite future decreed by the simple stroke of an administrative officer's pen.

It is submitted that to bar delivery of *all* mail for the indefinite future constitutes a prior restraint of innocent mail in defiance of the First Amendment.[14] This Court should, therefore, exercise its power of supervision to nullify this suppression of free expression guaranteed by the First Amendment.

III

Question 3: The Postmaster General's Order Inflicts Cruel and Unusual Punishment in Violation of the Eighth Amendment

The order of the Postmaster under review severs *in toto* and for the indefinite future *all* mail addressed to plaintiff (29a-30a). Though the technique of 39 U. S. C. § 259a is that of restraint and is not that of punishment in the customary sense of that term, such as for conviction of a crime, nevertheless the effect of the order—paralysis of a person's business and its imminent destruction—is, in a realistic sense, cruel and unusual punishment forbidden by the Eighth Amendment.[15]

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[14] *Near* v. *Minnesota*, 249 U. S. 47; *Hannegan* v. *Esquire*, 327 U. S. 146, Blackstone's Commentaries, Part IV, p. 151, Lockhart & McClure, Literature, The Law of Obscenity and the Constitution 38 Minn. Law Rev. 295 at 309-316, 388-390.

[15] *Heman* v. *U. S.*, (C. A. 6th) 163 F. 2d 228; *Brown* v. *Lederer*, (C. A. 7th) 140 F. 2d 136, cert. denied, 322 U. S. 734; *Mayor etc.* v. *Bauer*, 26 N. J. Misc. 1, 55 A. 2d 883 aff'd in 137 N. J. L. 327, 59 A. 2d 809.

The challenged order does not provide for a limited injunctive remedy directed solely against the material claimed to be obscene. Rather *all* mail, against which no factual determination of obscenity has been made, is barred.

An all-embracing order of this nature, affecting both legal as well as allegedly illegal mail, lacks the discriminating selectivity which the Supreme Court approved in *Donaldson v. Read Magazine*, 333 U. S. 178. In that case, the Supreme Court strongly implied that an order barring *all* mail to plaintiff's magazine because a puzzle contest had been found to be a fraudulent scheme would be constitutionally objectionable. Accordingly, it sustained the fraud order because only mail addressed to the contest editor for the "fraudulent" puzzle contest was restrained.

As previously stated, no person in modern society can live in a normal fashion without mail service. To bar a person from receiving all mail constitutes a most unusual punishment.

In addition to being unusual, the punishment is cruel. The order has no time limit. Its operation is for the indefinite future. Indeed, for aught that appears, it is for life!

Criminal statutes in all jurisdictions, in providing punishment for a criminal act, specify time limits and money limits. Advancing civilization has insisted that the punishment fit the crime. While there is a considerable degree of latitude in the exercise of a legislature's sound discretion, the limitations of the Eighth Amendment must still be observed.[16]

The provisions of the Eighth Amendment are precepts of justice and humaneness in dealing with acts forbidden by society through legislative process. The amendment forbids punishment shockingly disproportionate to the offense. The punishment for a transgression must not be so severe as to shock the moral sense of reasonable men as to what is right and proper under the circumstances.[17]

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[16] Ex Parte Pickens, (Alaska, 3rd) 101 F. Supp. 285; *Bell* v. *U. S.*, 349 U. S. 81.

[17] *Mayor etc.* v. *Bauer*, 26 N. J. Misc. 1, 55 A. 2d 883, aff'd in 137 N. J. L. 327, 59 A. 2d 809.

The proscription of *all* mail, whether related to obscenity or not, is neither right nor proper for two reasons:

1. The technique is broadside and destroys innocent communications in the process of attacking the guilty.

2. Society has many more effective remedies than a broadside injunctive order of the type issued here.

Distribution of obscene material is a crime (18 U. S. C. § 1461). The criminal statute provides for imprisonment of not more than five years, or a fine of $5,000, or both. These penalties obviously are not trivial. They are purposefully made severe in order to achieve the desired deterrent effect.

The government is not, in these types of cases, forced by unique circumstances to adopt one method of control and one method only. There is a variety of available techniques to control distribution of "obscene" material. There is, in addition to the criminal sanction, seizure of the offending material; there is the injunctive remedy against the material itself; there is the Tariff Act (19 U. S. C. § 1305-a).

The method which the Post Office Department insists was authorized by 39 U. S. C. § 259a, that of preventing delivery of *all* mail, is most unusual, impinging as it does on innocent communications, and most cruel because the duration of the order is for the indefinite future. The breadth and scope of the order are, consequently, in derogation of the Eighth Amendment.

IV

Question 4: Administrative Due Process of Law Was Denied by the Hearing Examiner in Contravention of the Fifth Amendment

A basic fundamental of due process of law guaranteed by the Fifth Amendment is a fair hearing. While strict rules of evidence and procedure prevailing in judicial tribunals have been considerably relaxed when it comes to administra-

tive hearings, concepts of fairness still require that only probative evidence be admitted and that rights of cross-examination and rebuttal be respected.[18]

As was stated by the Supreme Court in *Market St. Railway Co.* v. *Railroad Commission, etc.*, 324 U. S. 548, at page 562:

> "Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal."

It will be demonstrated under the appropriate headings below that the fair hearing contemplated by the Fifth Amendment was seriously abridged in this case.

A. Admission of Prejudicial Hearsay Evidence

While it is recognized that hearsay evidence is not forbidden by the Administrative Procedure Act, the judicial decisions have been uniform in forbidding the use of hearsay of such low probative quality that it is not entitled to credence.[19] Unless hearsay has high probative quality, it is not entitled to admission. Its exclusion becomes all the more imperative when the hearsay is intensely prejudicial in the sense that it has negligible probative weight while it creates strong bias and prejudice. The hearsay admitted by the Hearing Examiner, over objection and exception of petitioner's counsel, was of this objectionable category.

1. Over the strenuous objection of petitioner's counsel that they constituted prejudicial hearsay, several letters allegedly from "members of the public" criticising the materials offered for sale by petitioner were admitted in evidence (Tr.

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[18] 5 U. S. Code, § 1006 (c); *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 343; *Matheos* v. *Garfinkel*, (W. D. Pa.) 119 F. Supp. 810; *U. S.* v. *Prince George's County*, (Md. Div.) 40 F. Supp. 436.

[19] *Consolidated Edison Co.* v. *N. L. R. B.*, (C. A. 2d) 95 F. 2d 390; *Automobile Sales Co.* v. *Bowles*, (N. D. Ohio) 58 F. Supp. 409.

48). Of what probative value to the issues in this case are such letters, even assuming that they did emanate from certain living persons? What kinds of people were these "members of the public," typically broad-minded Americans or narrow-minded prudes who would find sensuality even in the Mechanic's Lien Law?[20]

Is the basis for their criticism rational or irrational? There was no opportunity for cross-examination. Clearly, these letters should have been excluded as astronomically remote to the issues and of no evidentiary value.

The Hearing Examiner tried to justify their admission by stating in his decision that they merely "serve to indicate or disclose the over-all operation of the enterprise in question" (6a). How do they? Moreover, "the over-all operation of the enterprise in question" was not a significant fact to be proved under the statute. Even if it were, that was already proved by the exhibits of advertisements, pictures, drawings and films.

What was the purpose of introducing these letters from "members of the public"? Obviously, to create an atmosphere of prejudice against petitioner. They could serve no other possible purpose.

2. The testimony presented by the Post Office Department through Mr. Canty to generate an inference that sex criminals commit their crimes because they are provoked by the kinds of pictures sold by petitioner is a dangerous form of pyramiding of inference upon inference. No court would countenance such pyramiding. Even under the liberal rules in the conduct of administrative hearings it is not permitted.[21]

Over the persistent objections of petitioner's counsel, Mr. Canty was permitted to narrate the request of the detective from the Detroit Homicide Squad who was holding Long-

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[20] *Cf. Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101, aff'd in 166 Pa. Sup. 120, at 137-138.

[21] *Automobile Sales Co.* v. *Bowles*, (N. D. Ohio) 58 F. Supp. 409.

fellow on suspicion of murder (Tr. 157): to narrate what Longfellow said with regard to the effects the pictures had on him (Tr. 163): to narrate what Longfellow told him he did to his three wives (Tr. 164): to narrate the similarity of sex pictures found on other *unidentified* convicted criminals (Tr. 183). These *similar* pictures of the *other* criminals were not even produced at the hearing so that a comparison could be made. Nor was Longfellow available for cross-examination.

The plain strategy of the Post Office Department in offering this expert witness was to try to prove that "salacious material" is an important causal factor in the commission of sex crimes (Tr. 151-156). But there is very little of a scientific nature to support the inference. Psychologists and other students of human behavior have not even scratched the surface in providing reliable data on this important social problem (Tr. 121, 126, 197). Those who assert the inference generally place heavy reliance on the untested conclusions of prison wardens and others connected with law enforcement agencies. However, there is nothing to indicate the basis for their conclusions other than the bare fact that sex criminals and sexual psychopaths are also interested in sex literature and pictures. No attempt is made to determine whether they are psychopathic as a result of reading such literature or whether they read such literature as a result of their psychopathic character. Cause and effect are thus glibly assumed without supporting scientific data.

Careful research in this field has disclosed two important works on this subject. One of them, interestingly enough, is an article entitled the "Sexual Psychopath" which appeared in the American Medical Association Journal (Vol. 146, No. 8, June 23, 1951, pp. 721, *et seq.*) written by Dr. Ben Karpman, one of the expert witnesses for the Post Office Department. Pointing out that the sexual psychopath and the non-criminal paraphiliac stem from the same sources and develop along the same path, he observes that the sexual offense is not a substitute for normal sexual relations, and

> "cases are known where neither excessive intercourse nor abstinence stopped it. It is a form of sexual activity all its own, satisfying some very specific needs of the individual that normal sexual activity cannot give."

Then this most significant statement appears (at p. 724):

> "Contrary to popular misconception, people who read salacious literature are less likely to become sexual offenders than those who do not, for the reason that such reading often neutralizes what aberrant sexual interests they may have."

Appellant's expert witnesses, Drs. Ellis & Lindner, testified to the same effect (Tr. 211, 220, 232, 234, 255, 267-269).

The other important work on this subject is a report of psychological research conducted by Dr. Seymour Feshbach of the University of Pennsylvania. In an article entitled, "The Drive-Reducing Function of Fantasy Behavior" appearing in the Journal of Abnormal and Social Psychology (Vol. 50, January 1955, pp. 3-11), he describes his experimental findings confirming the scientific theory that fantasy tends to reduce aggressive behavior. Specifically, it was found that those persons subjected to provoking stimuli who "were given the opportunity to express their aggression in fantasy would subsequently display less hostility * * * than a comparable * * * group which engaged in non-fantasy activities."

Why did the Post Office Department call Mr. Canty to testify that sex criminals commit their psychopathic acts because of obscene pictures instead of having Dr. Karpman testify on that point? Is it because of what Dr. Karpman had written in the American Medical Journal?

The subtle strategy of the Post Office Department would have been ingenious if its fallacies were not so apparent. Built on a shaky foundation of hearsay, the evidence proceeds on the well-known *post hoc ergo propter hoc* fallacy. The

inference that Longfellow did what he did because of the pictures has no basis in logic, reason, or psychology. What prompted him to buy such pictures for 20 years? What was the source of his morbid interest? What would his behavior have been without the pictures? These elementary questions, among many others, effectively expose the unsoundness of all this testimony offered through Mr. Canty.

Yet the Hearing Examiner permitted the Post Office Department to elicit worthless hearsay and pyramid one inference upon another to construct a most damaging conclusion. This is not due process of law.

B. Undue Restriction of Cross-Examination

The primary object of cross-examination is to elicit the whole truth and to test the basis for a witness' conclusions. Unduly to restrict the opportunity to cross-examine is an infringement of fundamental rights protected by the due process of law clause.[22]

Instances of such infringement are the following:

1. The Postal Inspector testified that though the Post Office Department had been investigating petitioner's operations since 1949 or 1950, and though he personally had been on the case "intermittently since about 1951", the complaint in the case at bar was not served until May 25, 1955 (Tr. 279-280). This witness had, in the course of his official duties, consulted a Baltimore psychiatrist with regard to the pictures and was informed that "there might be some possibility that these pictures have some value, in fact, by permitting people with sadomasochistic drives to dissipate them vicariously" (Tr. 285-286).

The object of this line of cross-examination was to show that even the Post Office Department, after consulting with

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[22] *Southern Stevedoring Co.* v. *Voris*, (C. A. 5th) 190 F. 2d 275.

"one of the outstanding experts in this area," had serious doubts whether plaintiff's material was obscene. It is for that reason that for a period of about six years no action was taken by the Post Office Department.

The testimony was not only relevant, it also had high probative force. Nevertheless, the Hearing Examiner frustrated this line of inquiry on the ground that "such testimony from this witness is not relevant * * * it is not proper and competent to come from this witness" (Tr. 289).

That the evidence was relevant there could be no doubt. That it was proper and competent to come from this witness, there also could be no doubt. For the point was not the validity or invalidity of the psychiatrist's opinion. The point was the Post Office Department's acceptance of the opinion and its inaction for six years in accordance with that opinion. Not to have permitted this line of cross-examination was a prejudicial infringement of the right of cross-examination.

2. Dr. Karpman was a decidedly hostile witness. The opinions he expressed were bizarre and warped. To him "every person is neurotic unless proven otherwise" (Tr. 123). It was, therefore, vital to subject his views to a searching cross-examination.

Cross-examination of this witness was, nevertheless, unduly restricted.

For example:

a) Dr. Karpman had disputed the prevalence in conventional magazines of displays of nudity. Plaintiff's offer of an issue of Esquire Magazine as one example to the contrary was barred (Tr. 114-115).

b) Efforts to inquire into this witness' criteria of what is indecent, obscene, obnoxious, corrupting, degrading, demoralizing—words he freely used—by pointing to the manner in which perfumes, lingerie, hosiery and other intimate articles of feminine apparel were advertised and marketed were ruled out by the Hearing Examiner (Tr. 117).

c) An excerpt was read to the witness from a U.N. magazine article which deplored the lack of scientific data and urged the initiation of scientific research in the fields of the cinema and pornography (Tr. 121, 126). The purpose was to impeach the opinions of the witness, which were based substantially on studies of criminals, and to show divergent opinions. This line of cross-examination was also barred by the Hearing Examiner.[23]

d) The witness had characterized himself as an expert on obscenity. It was therefore, important to determine whether his expertness was reasonably related to the recognized criteria of obscenity, that is, whether the tendency of the material, in terms of current mores and the moral standards of the broad community, is to excite prurient interest and lustful sexual desires. In addition, this witness had manifested evident bias by the repeated use of moralistic instead of scientific words to describe exhibits (42a-44a).

An effort was therefore made to interrogate the witness with regard to a book which he had written entitled "The Alcoholic Woman" and of which 44,000 copies were sold. As stated in petitioner's affidavit (44a-45a):

> "this book describes in sordid detail and in the literal gutter language quoted from prostitutes and other derelicts, the hundreds of times these unfortunate women were violated sexually. The book abounds in the crude, lewd, coarse and filthy language used by the participants before, during, and after their sexual orgies. Furthermore, the manner in which each sexual act was consummated is described with minute particularity. This was not necessary in the interests of science, but it was smut for smut's sake."

Cross-examination of the witness to discredit his moral integrity and to expose his evident bias was barred by the Hearing Examiner (Tr. 133-135).

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[23] *Reilly* v. *Pincus*, 318 U. S. 269.

All these instances of undue restriction of the right of cross-examination denied due process of law to petitioner in his defense.

C. Illegal Exclusion of Competent Evidence

Rebuttal evidence which fairly detracts from the evidence offered to support the charges is as important as cross-examination.[24]

As pointed out above, the crucial issue in this case was the level of public acceptance of pictures and drawings as dictated by the community's standards of morality and decency.[25] On this point, petitioner offered in evidence a huge quantity of magazines, cartoons and other publications containing features similar to the exhibits of petitioner's material. Most of these periodicals bore notations on their fly leaf that they enjoyed second-class mailing privileges (Tr. 312). Yet, they were excluded from evidence by the Hearing Examiner.

Also excluded from evidence were the following exhibits offered by petitioner:

a) A number of newspapers containing pictures and cartoons similar to those distributed by petitioner (Tr. 321).

b) Two reels of motion pictures together with a certificate by the University of the State of New York showing that these films were passed by the Board of Censors. Many scenes from these films were reproduced in petitioner's magazines and pamphlets (Tr. 325).

Exclusion of all this evidence offered by petitioner denied him due process of law.

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[24] *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474.

[25] *Roth* v. *United States*, 354 U. S. 476; *Roth* v. *Goldman*, (C. A. 2d) 172 F. 2d 788; *Parmelee* v. *U. S.*, (D. C. Cir.) 113 F. 2d 729, 731.

D. Discrimination

The magazines, cartoons and other publications containing features similar to petitioner's material all had notations that they enjoyed second-class mailing privileges (Tr. 312). It is, therefore, fair to infer that they were carried through the mails. In point of fact, judicial notice can be taken of the fact that a magazine like Esquire is distributed through the mails.[26]

The courts have uniformly held that the Post Office is without power to extend the benefits of the postal service to one classe of persons and to deny them to another of the same class.[27] Arbitrary discrimination between persons in similar circumstances is a denial of due process of law.[28]

The record unmistakably reveals that there was evident partiality on the part of the Hearing Examiner in his rulings on evidence. Prejudicial hearsay was permitted for the Post Office Department and inference pyramided on inference whereas competent and relevant evidence offered by petitioner was excluded. This robbed the hearing of that degree of fullness and fairness that is guaranteed by the Fifth Amendment. Aggravating this denial was the illegal and undue restriction of cross-examination. The cumulative effect is such great prejudice to plaintiff that he was deprived of due process of law under the Fifth Amendment.[29]

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[26] *Hannegan* v. *Esquire*, 327 U. S. 146.

[27] *Cf. Pike* v. *Walker*, 121 F. 2d 37, cert. denied 314 U. S. 625.

[28] *Wallace* v. *Currin*, 95 F. 2d 856 aff'd in 306 U. S. 1; *Detroit Bank* v. *U. S.*, 317 U. S. 329, 338.

[29] *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229-230; *Penn. R. R. Co.* v. *Chamberlain*, 288 U. S. 333. *Donnelly Garment Co.* v. *N. L. R. B.* (C. A. 8th) 123 F. 2d 215, 224; *N. L. R. B.* v. *Burns* (C. A. 8th) 207 F. 2d 434.

CONCLUSION

The decision in the case at bar is in conflict with three decisions of the Court of Appeals, D. C. Circuit, on the same set of facts. An important question of statutory construction (39 U. S. C. § 259a) which has not been but should be settled by this Court is presented. The Courts below have rejected the principles enunciated by this Court in construing another statute (39 U. S. C. § 259) worded, in relevant portions, almost identically, and have failed to give effect to the mandate of the First, Fifth and Eighth Amendments. Hence, in the interests of justice this Court's power of supervision should be exercised and the petition for a writ of certiorari granted.

Dated: New York, April 10, 1958.

Respectfully submitted,

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APPENDIX A

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

64 Statutes 451 (1950)

39 U. S. Code § 259a

Exclusion from mails of obscene, lewd, etc. articles, matters, devices things or substances.

Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes.

Certificate of Service

I, Coleman Gangel, one of the counsel for petitioner in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of April, 1958, I served copies of the foregoing petition for a writ of certiorari on the respondent, Robert H. Schaffer, individually and as Postmaster of the United States Post Office at New York, N. Y., by causing copies thereof to be mailed in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D.C., and the United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Dated, April 11, 1958.

COLEMAN GANGEL,
Counsel for Petitioner.

APPENDIX B

Per Curiam Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 140—October Term, 1957.

(Argued January 9-10, 1958 Decided January 31, 1958.)

Docket No. 24778

IRVING KLAW,

Plaintiff-Appellant,

—v.—

ROBERT H. SCHAFFER, individually and as Postmaster of the United States Post Office at New York, N. Y.,

Defendant-Appellee.

Before: HINCKS, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edelstein, *J.*, granting defendant's motion for summary judgment. The opinion below is reported at 151 F. Supp. 534. Affirmed.

SOL JACOBSON, New York, N. Y. (Brower Brill & Gangel, Joseph E. Brill, and Coleman Gangel, New York, N. Y., on the brief), for appellant.

BENJAMIN T. RICHARDS, JR., Asst. U. S. Attorney, Southern District of New York, N. Y. (Paul E. Williams, U. S. Attorney, S. D. N. Y., New York, N. Y., on the brief), for appellee.

PER CURIAM:

Affirmed on the opinion below, 151 F. Supp. 534. *Roth* v. *United States*, 354 U. S. 476; *Public Clearing House* v. *Coyne*, 194 U. S. 497.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United State Court of Appeals, in and for the Second Circuit, held at the United States Court-house in the City of New York, on the 31st day of January, one thousand nine hundred and fifty-eight.

Present: HON. CARROLL C. HINCKS,

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

IRVING KLAW,

Plaintiff-Appellant,

—v.—

ROBERT H. SCHAFFER, individually and as Postmaster of the United States Post Office at New York, N. Y.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,

Clerk